IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 994 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and

MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?No

2. To be referred to the Reporter or not? No

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

DILIPKUMAR J PATHAK

Versus

STATE OF GUJARAT

Appearance:

Mr. P.M. Vyas for the appellant.

Mr. K.P. Rawal, APP, for the respondent.

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI

Date of decision: 27/08/97

ORAL JUDGMENT : (Per: Panchal, J.)

In this appeal, which is filed under Section 374 of the Code of Criminal Procedure, 1973, appellant has challenged legality and propriety of judgment and order dated October 12, 1990, rendered by the learned Sessions Judge, Ahmedabad (Rural), at Mirzapur, Ahmedabad, in

Sessions Case No.39 of 1989, by which the appellant is convicted under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life.

Deceased Raisinh Lalubhai was running a pan-shop in the name and style of "Jitendra Pan Center" at Gohil Sheri, Sanand. The house of the appellant was just opposite the shop of the deceased and the distance between the shop of the deceased and the house of the appellant was about 25 feet. The incident in question took place on December 28, 1988. The deceased, who was running the pan-shop, was playing tape-recorder at high volume. Therefore, at about 9. 45 p.m. the appellant went to the shop of the deceased and asked him to tone down volume of the tape-recorder. Because of insistence on the part of the appellant to tone down volume of the tape-recorder, an altercation took place between the appellant and the deceased. Witnesses Pravinbhai Chandubhai Masani and Dashratsinh Dadubha Sisodiya, who were sitting on the steps of temple of Ranchhodji, intervened and pacified the appellant as well as the deceased. The deceased assured the appellant to tone down volume of the tape-recorder, and, therefore, the appellant returned to his house. However, the deceased did not tone down volume of the tape-recorder. After waiting for about 45 minutes, the appellant again went to the shop of the deceased and asked him to tone down volume of the tape-recorder. This time also, an altercation took place between the appellant and the deceased and, when the deceased attempted to get down from the shop, the appellant inflicted a blow with knife on the chest of the deceased. After causing injury to the deceased, the appellant started running away towards Tapal Market. The witnesses and the deceased, therefore, chased the appellant. However, the deceased fell down near Jetha Venanu Dela. The two witnesses removed the deceased to the Nagar Panchayat Hospital, Sanand, in a hand lorry. At the hospital, the deceased was treated by medical officer, Mr.Gandhi. During the course of treatment, the deceased succumbed to the injuries. On December 28, 1988, at about 23.30 hrs., witness Pravinbhai Chandubhai Masani lodged first information report with Sanand Police Station. Complaint filed by Mr. Masani was investigated by Mr. Rameshchand Balabhai Patel, who was discharging duties as Police Sub-Inspector, Sanand Town Police Station. The appellant himself surrendered with weapon at Sanand Town Police Station on December 29, 1988 at about 0.15 hrs. The investigating officer, therefore, prepared arrest panchanama and seized the knife produced by the appellant in presence of panchas. The investigating officer,

thereafter, went to the place of occurrence and covered the spots which were found to have been blood stained. On the next day, he recorded statements of witnesses who were found to be conversant with the facts of the case. In the morning of December 29, 1988, the investigating officer held inquest on the dead body and prepared panchanama of place of incident in presence of panch witnesses. From the place of incident, the investigating officer seized earth soaked in blood, control sample, etc. Autopsy on the dead body was performed by Dr. Gandhi on December 29, 1988 at about 7.55 a.m. Articles which were seized during the course of investigation were forwarded by the investigating officer to the Forensic Science Laboratory for analysis. After completion of investigation and receipt of report from the Forensic Science Laboratory, the appellant was chargesheeted in the court of the learned Judicial Magistrate (First Class), at Sanand, for the offences under Sections 302 and 504 of the Indian Penal Code. As offence under Section 302 is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, at Mirzapur, Ahmedabad, for trial, where it was numbered as Sessions Case No. 39 of 1989.

Charge Exh.3 was framed by the learned Sessions Judge against the appellant. The charge was read over and explained to the appellant who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Dr.Ajay N. Gandhi, P.W. No.1, Exh.6, (2) Pravinsinh C. Masani, P.W.No.2, Exh.12, (3) Dashratsinh Dadubha Sisodiya, P.W.No.3, Exh.14, (4) Danubhai Prabhatsinh, P.W. No.4, Exh.18, (5) Balwantbhai Bhikhabhai, P.W.No.5, Exh.22, and (6) Rameshchandra B. Patel, P.W. No.6, Exh.25, to prove the case against the appellant. The prosecution also produced documentary evidence such as complaint filed by witness Masani, post-mortem notes prepared by Dr. Gandhi, report received from the Forensic Science Laboratory, panchanamas prepared during the course of investigation, etc. in support of its case against the appellant. After recording of evidence of prosecution witnesses was over, the learned Judge questioned the appellant generally on the case and recorded his statement under Section 313 of the Code of Criminal Procedure,1973. In his further statement, the appellant denied the case of the prosecution, but did not lead any evidence in his defence.

On appreciation of evidence led by the prosecution, the learned Judge held that the prosecution proved its case against the appellant beyond reasonable

doubt. In view of this conclusion, the learned Judge convicted the appellant and imposed sentence on him, which is referred to earlier, by the impugned judgment, which has given rise to the present appeal.

Mr. P.M. Vyas, learned counsel for the appellant, has taken us through the entire evidence on record. It was submitted that no blood stains were found near the pan-shop of the deceased and as the incident was not witnessed by the witnesses Masani and Sisodiya, the appeal deserves to be allowed. It was emphasized that the incident had taken place near Jetha Venanu Dela where the deceased was actually found lying by the witnesses and, as it was not possible for the witnesses to see the incident, the appellant should be acquitted. In the alternative, the learned counsel for the appellant pleaded that, without any premeditation, one blow with knife was given by the appellant while the deceased was in the process of getting down from his shop and, as the quarrel had preceded giving of the blow, the appellant should be convicted under Section 304 Part II of the Indian Penal Code, and the sentence imposed on him should be suitably modified.

Mr. K.P. Rawal, learned Additional Public Prosecutor pleaded that the incident had taken place near the pan-shop of the deceased and not near Jetha Venanu Dela, as pleaded by the learned counsel for the appellant. It was argued that the evidence of panch witness Balwantbhai shows that just near Jitendra Pan Center, earth soaked with blood was found, which was seized under a panchnama and this circumstance shows that the incident had taken place near the pan-shop of the deceased and not near Jetha Venanu Dela as pleaded on behalf of the appellant. It was stressed that the incident in question was witnessed by Mr. Masani and Mr. Sisodiya and, as their evidence is truthful, no error is committed by the learned Judge in accepting their evidence for convicting the appellant. What was asserted by the learned counsel for the State Government was that the appellant had inflicted knife blow on the chest of the deceased, which is the part of the body, with a great force and as the evidence of Dr. Gandhi indicates that the injury was sufficient in ordinary course of nature to cause death, conviction of the appellant under Section 302 of the Indian Penal Code should be upheld.

The fact that deceased Raisinh Lalubhai Sisodiya died homicidal death is not in dispute before us in the present appeal. Two witnesses, i.e., Pravinbhai Chandubhai Masani and Dashratsinh Dadubha, have narrated

in detail the injuries sustained by the deceased by means of a knife. In the inquest report, the injuries which were noticed on the dead body are mentioned. Dr. Ajay Navinchandra Gandhi performed autopsy on the dead body of the deceased. In his substantive evidence before the court, the doctor has given full particulars of the injuries which were noticed by him while performing autopsy on the dead body. Injuries noticed by the doctor while performing autopsy are also mentioned in the post-mortem notes prepared by him. From the post-mortem notes, it is evident that death was due to injury to the internal vital organs like lung coupled with shock due to internal haemorrhage. Having regard to the evidence of Dr. Ajay Navinchandra Gandhi, which is corroborated by the post-mortem notes prepared by him, we are of the opinion that the finding recorded by the learned Judge that the deceased died homicidal death is eminently just and is hereby upheld.

In order to bring home guilt of the appellant, the prosecution has examined two eye-witnesses, namely, Pravinbhai C. Masani and Dashratsinh Dadubha Sisodiya. Witness Pravinbhai is resident of village Sanand and was known to the deceased as well as the appellant. The witness has stated that on December 28, 1988, at about 9.45 p.m., he was sitting on the steps of temple of Ranchhodji with Dashratsinh Sisodiya and Anilkumar Bhatia. According to the witness, the deceased was playing tape-recorder and the appellant had asked the deceased to tone down volume of the tape-recorder. The witness has deposed that an altercation had taken place between the appellant and the deceased, and he as well as Dashratsinh Sisodiya had intervened and pacified the appellant as a result of which the appellant had returned to his house. According to the witness, after about 45 minutes, the appellant had again come to the pan-shop of the deceased and asked the deceased to tone down volume of the tape-recorder. The witness has categorically stated that, when the deceased was trying to get down from the shop, the appellant had given a blow with knife on the chest of the deceased and thereafter ran away. The witness has also informed the court that he had removed the deceased to the government dispensary for treatment and in that process his clothes were sustained with blood of the deceased. This witness has been cross examined at length by the learned counsel for the appellant. In his cross examination, the witness has admitted that the deceased had not toned down volume of the tape-recorder.

Witness Dashratsinh Sisodiya has also deposed on

oath before the court that on December 28, 1988, he was sitting on the steps of temple of Ranchhodji where he was joined by Anilkumar Karsanbhai and Pravinbhai C. Masani. According to this witness, an altercation had taken place at about 9.45 p.m. between the appellant and the deceased as the deceased was playing tape-recorder at high volume. The witness has asserted that he had intervened in the quarrel and the appellant had returned to his house. The witness has asserted that at about 10.30 p.m. the appellant had again gone to the shop of the deceased and scolded the deceased for not toning down volume of the tape-recorder. The witness has categorically stated that, when the deceased was attempting to get down from the shop, the appellant had given a blow with knife on the chest of the deceased and had thereafter run away. The witness has informed the court that the deceased, witness Masani and he himself had chased the appellant, but the deceased had fallen down near Jetha Venanu Dela. According to this witness, he had also helped witness Masani in removing the deceased to the hospital. This witness has also asserted that, in the process of removing the deceased to the hospital, his clothes were stained with blood. In his cross examination, the witness has categorically admitted that, when the appellant came to the shop of the deceased second time, an altercation had taken place between the appellant and the deceased. The witness has further admitted that before the deceased could get down from the shop, the appellant had inflicted blow with knife on the chest of the deceased. Both the witnesses are residing near the place of the incident. They are materially corroborated by the medical evidence on record regarding injuries sustained by the deceased as well as by the panchnama of place of occurrence which was prepared in presence of independent witnesses. It is not brought on record of the case that any of the two eye witnesses has any enmity with the appellant. It is also not shown that the eye witnesses are related to the deceased. The fact that clothes of both the witnesses were stained with blood is not in dispute. There is no manner of doubt that both the witnesses are truthful witnesses and reliable. Under the circumstances, we are of the opinion that no error is committed by the learned Judge in placing reliance on their evidence and concluding that their evidence establishes that the appellant had given knife blow on the chest of the deceased.

As we are of the opinion that the prosecution has proved beyond reasonable doubt that the appellant had inflicted knife blow on the chest of the deceased, which resulted into death of the deceased, question which

arises for consideration of the court is as to which offence is committed by the appellant? The prosecution has not led any evidence to establish that there was any enmity between the appellant and the deceased. The fact that the deceased was playing tape-recorder at high volume at about 9.45 p.m. is not in dispute. It is pertinent to note that the incident happened on a wintry night at about 10.30 p.m. Before the incident took place, the appellant had gone to the shop of the deceased and requested him to tone down volume of the tape-recorder. At that time also, an altercation had taken place between the appellant and the deceased, but, in view of the intervention of the eye witnesses, the appellant had come back to his house, probably, in view of the assurance given by the deceased to tone down volume of the tape-recorder. In view of evidence of witness Sisodiya, there is no manner of doubt that the deceased had not toned down volume of the tape-recorder at all, as a result of which, again the appellant had gone to the shop of the deceased and asked him to tone down volume of the tape-recorder. As per the evidence of eye witness Mr.Sisodiya, an altercation had taken place between the deceased and the appellant and the deceased had attempted to get down from the shop when altercation was going on, but, before the deceased could get down, the appellant had inflicted one blow with knife on the chest of the deceased. In order to bring the case with clause (3) of Section 300 of the Indian Penal Code, it must be proved that there was an intention to inflict that particular bodily injury which in ordinary course of nature was sufficient to cause death. In other words, that injury found to be present was the injury that was intended to be inflicted. If the prosecution proves that the injury was not accidental, then the case may fall within clause 3 of Section 300 of the Indian Penal Code. However, when a person tries to get down from his shop, there would be some movement on his part. Under the circumstance, we are of the view that the prosecution has failed to prove that the injury found to be present was the injury that was intended to be inflicted by the appellant. As noticed earlier, quarrel was followed by assault. If the appellant was so minded to kill the deceased, he would have done so at the first time when he had gone to the shop of the deceased at about 9.45 p.m. and would not have come back to his house at the intervention of the witnesses. Having regard to the totality of the circumstances, it is difficult to conclude that the appellant had intended to cause particular injury which was noticed by the doctor on the deceased. One can only say that the appellant must be attributed knowledge that he was likely to cause an

injury which was likely to cause death. Under this circumstance, the appellant is shown to have committed offence under second part of Section 304 of the Indian Penal Code.

Accordingly, we allow the appeal in so far we set aside the conviction of the appellant under Section 302 of the Indian Penal Code and instead convict the appellant under second part of Section 304 of the Indian Penal Code. In regard to sentence, we are informed that the appellant has already undergone rigorous imprisonment for eight years. Having regard to the facts and circumstances of the case, we substitute therefor sentence of rigorous imprisonment for a period already undergone. The respondent is directed to release the appellant if not required in any other case. Muddamal is directed to be disposed of as per the direction given by the learned Judge in the impugned judgment. The office is directed to send writ forthwith.

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